



April 21, 1999

Mr. Paul Sarahan
Litigation Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR99-1063

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 123600.

The Texas Natural Resource Conservation Commission ("TNRCC") received a request for Enforcement Reports submitted by the TNRCC pursuant to section 7.003 of the Water Code and for information regarding Agreed Order Docket No. 98-0069-AGR-E. TNRCC has made available to the requestor all of the responsive information that TNRCC believes to be public. You state that "[a]lthough the Order in this case has been published in the Texas Register, the Commission has not approved it, thus, settlement has not been achieved." You claim that the remaining portions of the requested information are excepted from disclosure under sections 552.103(a), 552.107, and 552.111 of the Government Code. You have submitted to this office representative samples¹ of the responsive information that you claim is exempt from disclosure. We have considered the exceptions you claim and reviewed the submitted information.

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation.² Thus, under section

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit a representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

²Section 552.103(a) excepts from required public disclosure information:

552.103(a) a governmental body's burden is two-pronged. The governmental body must establish that (1) litigation to which the governmental body is a party is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. See *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); Open Records Decision No. 551 at 4 (1990). A contested case under the Administrative Procedure Act is litigation for purposes of section 552.103. Open Records Decision No. 588 (1991). In this instance, you have made the requisite showing that the requested information relates to pending litigation for purposes of section 552.103. The requested records may therefore be withheld.

In reaching this conclusion, except as noted, we assume that the opposing party to the litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, e.g., through discovery or otherwise, no section 552.103 interest exists with respect to that information.³ Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103. We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Because this litigation appears to be concluding, we will address the other exceptions that you raise. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* Item 1 of Group C of the submitted

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

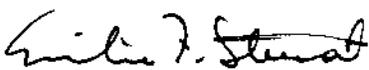
³The litigation exception does not apply to the letter from Matt Moore, Tom J. Moore Cattle Co. Inc. to Larry Fergusson, Water Program Manager, Waco Regional Office dated October 27, 1997. You must release this document.

documents contains confidential communications from the client to the attorney and may be withheld under section 552.107. Item 2 of Group C of the submitted documents reveals the attorney's legal advice and, therefore, may also be withheld under section 552.107.

You claim that the documents in Group B are excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. The preliminary draft of a policymaking document that has been released or is intended for release in a final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 (1990). The draft itself, including comments, underlining, deletions, and proofreading marks, is excepted from disclosure by section 552.111. *Id.* Purely factual matter, where severable, must generally be released. *Id.* However, when such factual matter is contained in the final version of the document, the release of the final version satisfies this requirement. *Id.* You may withhold the information contained in Group B from disclosure under section 552.111 of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Emilie F. Stewart
Assistant Attorney General
Open Records Division

EFS\nc

Ref: ID# 123600

Encl: Submitted documents

cc: Mr. Stuart N. Henry
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(w/o enclosures)